

**No. 16-15172**

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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CORNELE A. OVERSTREET, Regional Director of the Twenty-Eighth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD

Petitioner-Appellee

v .

SHAMROCK FOODS COMPANY

Respondent-Appellant

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PETITIONER-APPELLEE NATIONAL LABOR RELATIONS BOARD’S  
MOTION TO SUPPLEMENT RECORD

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The National Labor Relations Board (“the Board”) respectfully moves the Court to supplement the record on appeal with an affidavit from former Shamrock employee Thomas Wallace attesting to the cash settlement he accepted from Shamrock in lieu of reinstatement to his former position. This affidavit provides important context to the matter on appeal, as Shamrock has

informed the Court of Wallace's decision to decline reinstatement without including information about the related settlement.

1. Shamrock is appealing a district court order entering an injunction pursuant to § 10(j) of the National Labor Relations Act, 29 U.S.C. § 160(j), which authorizes interim relief from unfair labor practices.

2. One of the unfair labor practices addressed by the injunction is Shamrock's unlawful discharge of employee Thomas Wallace in retaliation for his union activity. In addition to requiring Shamrock to cease and desist from engaging in its extensive unfair labor practices, the injunction included an affirmative order requiring Shamrock to offer Wallace interim reinstatement.

3. On March 3, 2016, Shamrock moved the Court to supplement the record with a declaration of its Human Resources Specialist Natalie Wright, attesting that Wallace had declined its offer of reinstatement. Shamrock relies on this declaration in its opening brief to support its contention that portions of the relief granted by the district court are now moot. Shamrock's motion is still pending before the Court.

4. Shamrock's Wright declaration is fundamentally incomplete, as it omits any information about the context in which Wallace made his decision

regarding reinstatement. The Board herein seeks to further supplement the record with Wallace's affidavit providing that context, including the following points:

- a. Shamrock's written offer of reinstatement was accompanied by an offer of \$78,000 if Wallace agreed to decline reinstatement. It also informed him that his reinstatement would be rescinded, and his employment terminated, if the district court's order were overturned on appeal or if Shamrock prevailed before the Board in the administrative case regarding Wallace's discharge. This written offer is attached to Wallace's affidavit as Exhibit A.
- b. When Wallace verbally declined that offer and indicated his intention to return to work, Shamrock increased the offer to \$178,000 by telephone.
- c. When Wallace again declined that offer, Shamrock offered him \$214,000 "in exchange for [his] decision to waive [his] right to return to work at Shamrock and the release of claims . . . ." Wallace accepted this offer and received a check for the settlement amount on February 15, 2016. Shamrock's letter

setting forth this agreement is attached to Wallace's affidavit as Exhibit B.

- d. Wallace states that he always intended to return to work at Shamrock, but felt compelled to consider an offer of "so much money" because he has five children to support and had suffered "extreme financial hardships" after his unlawful discharge.

5. While the Board argues as a matter of law that Wallace's decision regarding reinstatement does not moot any portion of the injunction, it hereby moves the Court to further supplement the record with Wallace's affidavit regarding the details of his settlement with Shamrock in lieu of reinstatement.

6. Counsel for Shamrock has informed Board counsel that Shamrock takes no position on this motion.

Respectfully submitted,

s/ Amy L. Cocuzza

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Attorneys for Appellee NLRB

Dated at Washington, D.C.

March 31, 2016

Shamrock Foods Company  
Case 28-CA-150157

**Confidential Witness Affidavit**

**I, Thomas Wallace, being first duly sworn upon my oath, state as follows:**

**I have been given assurances by an agent of the National Labor Relations Board (NLRB) that this Confidential Witness Affidavit will be considered a confidential law enforcement record by the NLRB and will not be disclosed unless it becomes necessary to produce this Confidential Witness Affidavit in connection with a formal proceeding.**

I reside at 14967 North 137<sup>th</sup> Lane, Surprise, Arizona 85379.

I was employed by Shamrock Foods Company, whose corporate address is 3900 E. Camelback Road, Suite 300, Phoenix, Arizona 85018.

1. I was discharged from Shamrock Foods Company on about April 6, 2015. The National Labor Relations Board issued a Complaint and Notice of Hearing on July 31, 2015, alleging that my discharge violated the National Labor Relations Act. On September 8, 2015, the National Labor Relations Board filed a Petition for a Section 10(j) injunction in the United States District Court for the District of Arizona. The National Labor Relations Board sought, among other things, my immediate reinstatement to Shamrock Foods Company.
2. On February 1, 2016, the Honorable Judge Humetewa issued a decision ordering Shamrock Foods Company to offer me immediate reinstatement within five days, among other things.
3. On Friday, February 5, 2016, I received a letter from Shamrock Foods Company. The letter stated that the company was offering me reinstatement, but it also offered me

**Privacy Act Statement**

The NLRB is asking you for the information on this form on the authority of the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the NLRB in processing representation and/or unfair labor practice cases and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). Additional information about these uses is available at the NLRB website, [www.nlrb.gov](http://www.nlrb.gov). Providing this information to the NLRB is voluntary. However, if you do not provide the information, the NLRB may refuse to continue processing an unfair labor practice or representation case, or may issue you a subpoena and seek enforcement of the subpoena in federal court.

x TW

\$78,000 if I chose to decline reinstatement. I have attached a copy of this letter to this statement as exhibit A.

4. On Monday, February 8, 2016, I called Heather Vines-Bright ("Vines-Bright") at Shamrock Foods Company. She is a manager in the Human Resource Department. I told her that I wanted to return to work and that I was declining the monetary offer. I also told her that I needed to know my schedule and when I could return to work. She responded by telling me that she would have to speak with a supervisor and get back to me. She also told me that she was unsure how everything would work, so she would get back to me.
5. Vines-Bright called me back later in the afternoon and told me that I would start on Sunday and informed me what my schedule would be. Then she said that the company was willing to come up \$100,000 from the previous offer, making it \$178,000. I responded, "That's it?" She seemed a bit surprised by my response. Then, I told her to wish Natalie Wright ("Wright"), who also works in the Human Resource Department, congratulations on her new baby. Vines-Bright said she would let her know and then I told Vines-Bright that I would talk the offer over with my wife.
6. On Wednesday, February 10, 2016, I received a call from Wright. She told me that Vines-Bright was on vacation and that she would be taking over. We made small talk about her new baby and my progress in school, and then she said, "Okay, how can I help you." Then I said that I wanted to talk to her about the last offer. She asked if I was declining the last offer and I told her "yes." I made a counter offer well above their last offer. She said that she did not think the company would go up that high. Then, I told her that the offer would have to go up substantially if they did not want me to go back to

work. I told her that I knew that if I came back to work, it would be “bananas.” I was referring to the amount of union activity and support that would be spurred by my return. Wright responded by asking me if there was any wiggle room in my counter-offer. I just said that she would have to come back with a strong offer if she wanted me to consider not coming back to work. She said that she would get back to me the next day.

7. The next day, Thursday, February 11, 2016, I received a call from Wright in the late morning. She told me that the company would not come up to what I countered. But, she said that the company was offering what would end up to \$214,000 after taxes, but that I would be responsible for state and federal taxes. I told her that I would accept, but that I wanted to speak with my wife. Wright responded that I had to get back to her as soon as possible otherwise she would have to draw up the papers for my return. I told her that I would call her back as soon as I got home after picking up my children from school.
8. I called Wright back a couple hours later and Wright went over details of the offer with my wife and I. We made plans to meet at the Phoenix distribution center location the following morning to finalize the agreement.
9. The following morning, I went to Vines-Bright's office to meet with Wright. It was only Wright and I present. First, Wright asked if I had a recording device and told me that she did not consent to being recorded. I told her that I did not have a recorder. Then we went over the terms of the agreement, which I have attached to this statement as exhibit B. I signed the agreement.
10. After signing the agreement, Wright and I made some small talk. I told her that it was a shame that everything happened the way it did because I really liked working for the



company. We talked a bit about my progress in school and how I am pursuing a degree in human resources. She responded by telling me that I probably shouldn't tell very many people about the settlement, especially because I was going in to Human Resources. I asked her if I was going to get blackballed as I looked for other employment. She said that the only thing that the company was allowed to say if another employer called for a reference would be the dates that I was employed at Shamrock Foods Company. After we wrapped up the conversation, she asked if I would mind leaving the premises immediately. I said that I did not mind and I left.

11. Shamrock Foods Company had the settlement check hand delivered the following Monday, February 15, 2016.

12. I never wanted to lose my job from Shamrock Foods Company, especially just because I expressed support for union that was organizing the warehouse workers. I always intended to report back to work if I was offered reinstatement. However, when the company offered me so much money to decline reinstatement, I had to seriously consider it because I have five children to support and I went through some extreme financial hardships after I got fired.

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Case 28-CA-150157

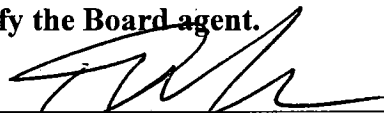
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 I am being provided a copy of this Confidential Witness Affidavit for my review. I understand that this affidavit is a confidential law enforcement record and should not be shown to any person other than my attorney or other person representing me in this proceeding.

I have read this Confidential Witness Affidavit consisting of 5 pages, including this page, I fully understand it, and I state under penalty of perjury that it is true and correct. However, if after reviewing this affidavit again, I remember anything else that is important or I wish to make any changes, I will immediately notify the Board agent.

Date: March 24, 2016

Signature: \_\_\_\_\_

  
 Thomas Wallace

Signed and sworn to before me on

March 24, 2016

at

Phoenix, AZ


Sara Demirok

Board Agent

National Labor Relations Board



Shamrock Foods Company, 3900 E. Camelback Road, Suite 300, Phoenix, AZ 85018, (602) 477-2500

**VIA EXPRESS DELIVERY – ADULT SIGNATURE REQUIRED**

February 5, 2016

Mr. Thomas Wallace  
14967 N. 137<sup>th</sup> Lane  
Surprise, AZ 85379

Re: Court Order

Dear Mr. Wallace:

Shamrock Foods Company ("Shamrock") has received the Order issued on February 1, 2016, by Judge Humatewa of the United States District Court for the District of Arizona (the "Order"). Shamrock has filed a request (or "appeal") with the Ninth Circuit Court of Appeals to have the Order overturned. Nothing in this letter should be understood as suggesting that Shamrock has changed its mind or that it will not continue with its appeal.

In the meantime, consistent with Judge Humatewa's Order, Shamrock is offering you immediate reinstatement to a loader position with a base hourly rate of \$12.00, plus all applicable bonuses added such as a years of service bonus, incentive pay based on productivity, perfect safety and attendance bonus and any other performance-related pay that is specified by the current pay plan. Shamrock's understanding, however, is that you may be employed by another company. If you decide to decline reinstatement at Shamrock permanently, the Company will pay you a lump sum amount of \$78,000, less applicable withholdings.

This offer would be conditioned only upon your agreement to refuse (or "waive") reinstatement at Shamrock at any time in the future, and to refuse any further payments or other relief in regard to your employment with Shamrock, except any vested benefit to which you may be entitled. It will **not** preclude you from testifying or otherwise participating in any future proceeding against Shamrock, although you would not be able to participate in any relief or remedy (including, but not limited to, reinstatement) that is granted. This offer also will not prevent the National Labor Relations Board from seeking a remedial posting referencing your April 6, 2015 discharge.

***Please understand that acceptance of this offer is purely voluntary.*** The offer does not in any way qualify or limit Shamrock's offer of immediate reinstatement. If you decide to accept reinstatement instead of the lump sum offer, that decision will not be held against you at any time or in any way.

If you accept reinstatement, you will be treated as having been continuously employed from your original hire date. You will be required to follow the same rules that apply to other associates in your classification. While you will be subject to discipline for the same reasons as

Shamrock Foods Company  
SINCE 1922

Ex. A

any other employee in your classification, your April 6, 2015 discharge will not be used against you in any way. All records of your April 6, 2015 discharge will be removed from your personnel file for the duration of your reinstatement under the Order.

Your reinstatement will be rescinded, and you will be released from Shamrock, if:

- a) The Order is overturned on appeal; or
- b) Shamrock prevails on the issue of whether your April 6, 2015 discharge was lawful in the case that is before the National Labor Relations Board.

In addition, the Separation Agreement and Release and Waiver that Shamrock offered to you on April 6, 2015 was, and is, withdrawn. Shamrock is not seeking your agreement to the Separation Agreement and Release and Waiver.

Please contact Heather Vines-Bright at 602-477-6966 by Friday, February 12, 2016, to let us know whether you intend to return to work.

Sincerely,

SHAMROCK FOODS COMPANY



Robert T. Beake  
Sr. Vice President, Human Resources



Via HAND-DELIVERY

February 11, 2016

Thomas Wallace  
14967 N. 137<sup>th</sup> Lane  
Surprise, AZ 85379

Settlement Agreement and Release and Waiver

Dear Thomas:

This letter (hereinafter, this "Settlement Agreement") confirms the terms related to your decision to not return to Shamrock Foods Company ("Shamrock" or the "Company") following Judge Humetewa's Order of February 1, 2016. In exchange for your decision to waive your right to return to work at Shamrock and the release of claims explained below, you will receive a check in the gross amount of \$214,270.30, less FICA and Medicare tax deductions that are mandatory, despite your exempt status designation on your W-4.

Included in this amount is the sum of \$24,270.30 which was calculated by determining the monthly amount of premium payments under COBRA for medical, dental and vision care if you had purchased coverage under Shamrock's Plans. Since you did not elect coverage from our COBRA Plan at the time of your termination, you would not be eligible to obtain coverage through this Plan, but you are able to use any of these funds to purchase health care coverage through all other healthcare Plans, including the Federal Exchange.

Please note that the Company is making no representations regarding the tax consequences of any amount received by you pursuant to this Settlement Agreement, or the propriety of the designations on your W-4.

1. It is understood that, in exchange for your Settlement Payment set forth in this letter, you release and waive the right to return to your former position with Shamrock as well as all claims, causes of action or the like, known or unknown, that you, your heirs, executors, administrators, and assigns have, had or may have in the future against the Company, and/or any of their respective parents, predecessors, successors, affiliates, and/or subsidiaries, including each of their directors, officers, agents and employees, and/or anyone else connected with any of the foregoing (collectively, "Released Parties"), with respect to all matters of your employment and separation from employment with the Company, including but not limited to, all allegations, claims, and violations related to severance, any reductions-in-force, notice of termination, the payment of your salary and benefits (except any valid claim to recover vested benefits to which you are entitled, if



applicable) and all claims arising under the following, in each case as amended: the Age Discrimination in Employment Act of 1967, as amended by the Older Workers Benefit Protection Act of 1990; Title VII of the Civil Rights Act of 1964; the Civil Rights Act of 1991; the Equal Pay Act of 1963; the Americans with Disabilities Act of 1990; the Family and Medical Leave Act of 1993; the Civil Rights Act of 1866; the Worker Adjustment and Retraining Notification Act; the Employee Retirement Income Security Act of 1974; any applicable Executive Order Programs; the Fair Labor Standards Act; and all of the state or local counterparts, or any other federal, state or local statute, constitution or ordinance; or under any public policy, contract or tort, or under any common law, including for wrongful discharge; or arising under any practices or procedures of the Company; or any claim for breach of contract, infliction of emotional distress, defamation, or any claim for costs, fees or other expenses, including attorneys' fees and expenses, incurred in these matters. You understand that this release and waiver does not waive or release your rights to government-provided unemployment benefits or worker's compensation benefits, if applicable. Further, you would be entitled to pursue any action for the Settlement Payment, or any rights or claims that you may have which arise after the date you execute this Settlement Agreement.

You also waive any claimed right or opportunity to seek reemployment, reinstatement, new employment, or an independent contractor relationship with Shamrock or any of Shamrock's parent, subsidiary or affiliated entities, at any location, now or ever in the future, and agree that you will not apply for nor seek in any way to be reinstated, re-employed, retained or hired by any of them in the future.

Nothing in this Agreement is intended to, or shall, interfere with your ability to file or otherwise institute a charge with an administrative agency alleging discrimination under federal, state, or local civil rights, labor and/or employment discrimination laws (including, but not limited to, Title VII, the ADA, the NLRA, and the ADEA). However, you waive any right, and you shall not be eligible, to any relief, remedies, recovery, or monies in connection with any such charge against Shamrock, regardless of who filed or initiated any such complaint, charge, or proceeding.

2. You agree that, except as may be required or protected by law, you will not, directly or indirectly, use or disclose, or allow the use or disclosure, to any person, business, firm, corporation, partnership or other entity any Confidential Information concerning the Company (including its parent, subsidiary or affiliated entities), its business, its suppliers or its customers. "Confidential Information" for purposes of this Agreement consists of information, whether written or otherwise, regarding Shamrock's trade secrets, customers, customer lists, costs, prices, earnings, prospective and executed contracts and other business arrangements, and sources of supply. You agree that any disclosure of such information to third parties and/or the use of such information by you would cause



irreparable damage to Shamrock and, therefore, Shamrock shall be entitled to an injunction prohibiting you from any use, disclosure or attempted use or disclosure.

3. You agree to return to the Company any and all documents, files, materials, records, computer discs and other items in your possession or control belonging to the Company or containing Confidential Information relating to the Company; to surrender to the Company any identification or credit cards, keys, telephones, equipment and other such items owned by the Company or within your possession, and to promptly reconcile any outstanding expense accounts.
4. You agree to reasonably cooperate with the Company in connection with any matter with which you were involved or any existing or potential claim, investigation, administrative proceeding, lawsuit or other legal or business matter which arose during your employment by the Company, as reasonably requested by the Company.
5. This Settlement Agreement contains the entire understanding between you and the Company regarding the subject matters set forth herein, and supersedes any and all other prior agreements, understandings, discussions, and negotiations whether written or oral between you and the Company. This Settlement Agreement cannot be changed except in writing signed by you and the Company. You acknowledge that neither the Company nor any representative of the Company has made any representation or promise to you other than as set forth herein.
6. You know and understand the contents of this Settlement Agreement and its binding effect, and have been afforded the opportunity to review its terms with an attorney prior to execution. You voluntarily and knowingly agree to the terms of this Settlement Agreement, which shall be interpreted under the laws of the State of Arizona (unless mandated to use another jurisdiction's laws).
7. This Settlement Agreement does not constitute an admission of any liability or wrongdoing on the part of the Company and the Company expressly denies same.

If the terms of this Settlement Agreement are acceptable to you, please sign and date this Settlement Agreement and return it to the undersigned.

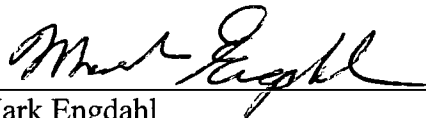
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PLEASE READ THIS AGREEMENT CAREFULLY. IT CONTAINS A RELEASE OF ALL KNOWN AND UNKNOWN CLAIMS.

YOU AGREE THAT YOU RECEIVED VALUABLE CONSIDERATION IN EXCHANGE FOR ENTERING INTO THIS AGREEMENT AND THAT THE COMPANY ADVISED YOU TO CONSULT AN ATTORNEY PRIOR TO SIGNING THIS AGREEMENT. YOU PROMISE THAT NO REPRESENTATIONS OR INDUCEMENTS HAVE BEEN MADE TO YOU EXCEPT AS SET FORTH HEREIN, AND THAT YOU HAVE SIGNED THE SAME KNOWINGLY AND VOLUNTARILY.

SHAMROCK FOODS COMPANY

By:   
Mark Engdahl  
Vice President, Operations

Received on this \_\_\_\_ day  
of \_\_\_\_\_, 2016.

Signature: \_\_\_\_\_  
Name: \_\_\_\_\_  
(Print)

**TERMS ACCEPTED** this \_\_\_\_ day of  
\_\_\_\_\_, 2016

\_\_\_\_\_  
Signature



**CERTIFICATE OF SERVICE****All Case Participants are CM/ECF Participants**

I hereby certify that on March 31, 2016, I electronically filed the foregoing Motion to Supplement Record and attached affidavit with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Amy L. Cocuzza  
Amy L. Cocuzza

Dated at Washington, D.C.  
March 31, 2016